(H)

No. 01-1479

In the Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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After GM's petition was filed, this Court reaffirmed in *National R.R. Passenger Corp.* v. *Morgan*, 122 S. Ct. 2061 (2002), that a Title VII claim is barred if based on the lingering effects or consequences of discrete discriminatory acts that occurred prior to the charge-filing period. *Morgan* did not resolve whether, as the Tenth Circuit held in this case, that rule is inapplicable if the lingering effects are pay disparities. Respondent offers no reason why this Court should not resolve the sharp circuit split over that important issue.

1. The Decision Below Rested On A Supposed "Paycheck Exception" To Title VII Timeliness Law.

Respondent does not deny that the pay disparities during the charge-filing period resulted entirely from *prior* acts of alleged discrimination. Instead, she mischaracterizes the Tenth Circuit's decision as resting on a "critical fact," namely, respondent's purported failure to learn that her pay was lower than other employees' due to GM's salary confidentiality policy. Opp. 1. But no such "fact" was established in the district court, and that issue was not "critical" or even germane to the decision below.

As respondent admitted and the district court found, she repeatedly complained about her pay level to GM managers long before the charge-filing period. Pet. App. 28a, 42a. These were not generalized gripes about pay but directly raised the discrimination issue:

> In approximately April 1996, plaintiff approached the plant personnel director regarding her compensation. *Plaintiff had*

> *heard that a white clerk at the plant was receiving a salary higher than hers.*

Id. at 28a (emphasis added). Respondent does not even mention these complaints, which cannot be reconciled with her current contention that she was not on notice of any salary disparities until March 1998. In any event, the Tenth Circuit did not base its decision on this asserted "critical fact" but rather on what it called a "crucial distinction" between pay differentials and all other lingering effects of pre-charge period discrimination. Pet. App. 7a. It is that *legal* ruling that petitioner challenges.

2. The Courts Of Appeals Are Divided Over The Validity Of The "Paycheck Exception."

The petition asks this Court to resolve the important question whether pay disparities should be treated differently from other lingering effects of past discriminatory acts when determining the timeliness of a Title VII claim. The courts of appeals are deeply divided on this question. See Pet. 12-17.

Respondent's repeated assertion that other courts of appeals "would have" ruled just as the Tenth Circuit did here (Opp. 3-5) is refuted by the decision below. The Tenth Circuit recognized that its ruling departed from that of the Seventh Circuit in *Dasgupta*, finding "unpersuasive" Judge Posner's opinion that a Title VII claim is barred if based on pay disparities resulting from discriminatory acts that occurred prior to the charge-filing period. Pet. App. 11a. Furthermore, respondent does not try to defend the incoherent distinction between pay and dividends on which the Tenth Circuit rationalized its departure from the

Eleventh Circuit's decision in *Carter*. *Id.* at 9a. And respondent does not even mention the other federal court decisions that have ruled the same as *Dasgupta*. See Pet. 14-15; Chamber of Commerce Amicus Br. 15-16 & n.12.

Respondent tries to minimize the lower courts' conflict and confusion on this issue by characterizing *Dasgupta* and *Carter* as "traditional tolling" cases, as if the only issue was whether the plaintiffs had "reason to know" of their pay disparities. Opp. 3. But that was not the basis of either decision. *Dasgupta* rested on the Seventh Circuit's recognition that the allegedly discriminatory pay disparities were but the "consequences of time-barred violations." 121 F.3d at 1140. And the Eleventh Circuit held the Title VII claims in *Carter* untimely because the lower dividend payments to female employees were but "the inevitable consequence" of discriminatory practices that had occurred prior to the charge-filing period. 225 F.3d at 1265.

These decisions did not rest on tolling, which this Court in *Morgan* said must be "applied sparingly" (122 S. Ct. at 2072), or on whether the "consequences" of the discrimination took the form of pay disparities. Instead, these courts properly recognized that the critical question is whether discrete acts of discrimination occurred before or after the beginning of the charge-filing period. If they occurred before, as in *Dasgupta*, *Carter*, and this case, the Title VII claim is time-barred. If they occurred after (or before *and* after), as in *Bazemore* and *Calloway*, the Title VII claim is timely. The Tenth Circuit, like several other courts of appeals, failed to draw the proper dividing line, misled by the oft-misconstrued "paycheck" sentence from *Bazemore*. See Pet. 15-16, 19-22.

3. The "Paycheck Exception" Conflicts With This Court's Precedents, Including *Morgan*, And With Title VII's Text And Purpose.

Respondent recognizes that this Court's precedents, which bar Title VII claims based on the consequences of discriminatory acts that occurred prior to the filing period, are not tolling decisions. See Opp. 6-7, discussing *Evans*, *Ricks*, and *Lorance*. Instead, respondent attempts to distinguish those cases as involving "a discrete act of discrimination *other than the establishment of a salary*." Opp. at 6 (emphasis added). She thus admits that, in light of this Court's decisions, the supposed "paycheck exception" to the Section 706(e) deadline relied on by the court below is the only way to make her claim actionable.

Respondent offers no textual basis for such an exception, and she does not respond to the petition's showing that the asserted exception, if recognized, would have dire consequences for the resolution of discrimination claims. See Pet. 25-30. The only rationale respondent does offer is indefensible. She suggests that pay disparities must be treated differently from other forms of discrimination because otherwise employers could "hide" intentionally discriminatory pay scales "under the guise of salary confidentiality." Opp. 8. But the fraudulent concealment doctrine protects against any such risk, whether the discrimination involves hiring, promotion, seniority, work assignments, or pay. See *Morgan*, 122 S. Ct. at 2072. There is no reason for courts to carve out generalized subject-matter exceptions to Congressionally mandated filing deadlines when tolling doctrines remain applicable in factually appropriate cases. And there is no

reason why GM should be forced to defend old employment decisions—stretching back 18 years—simply because they may have contributed to Goodwin's current salary. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980) ("Congress clearly intended to encourage the prompt processing of *all* charges of employment discrimination") (emphasis added).

This Court's recent decision in *Morgan* did not address the supposed "paycheck exception" on which the court below relied. However, *Morgan* supports GM's position that there is no such exception. At issue in *Morgan* was the Ninth Circuit's ruling that a Title VII claim is actionable, even if based on discriminatory acts occurring before the filing period, so long as those acts are "sufficiently related" to discriminatory acts, practices, or policies falling within the filing period. This Court held that such claims are barred when based on "discrete discriminatory acts" that occurred prior to the filing period. 122 S. Ct. at 2073. This Court also held that hostile environment claims, which involve "repeated conduct [that] cannot be said to occur on any particular day," may focus on behavior contributing to the hostile environment both prior to and during the filing period. *Ibid.*

The *Morgan* opinion first noted the importance of "strict adherence" to Title VII's filing deadlines in order to give effect to Congress's clear intent to "encourage the prompt processing of all charges of employment discrimination." 122 S. Ct. at 2070. It then explained that the language of Section 706(e), which states that a charge "*shall* be filed" within a set number of days "after the alleged unlawful employment practice *occurred*," makes

"filing a charge within the specified time period *mandatory*." *Ibid.* (emphasis added). Thus, with respect to "discrete acts" of discrimination, a claimant must file a charge by the statutory deadline "or lose the ability to recover for it." *Id.* at 2071.

After showing that its *Evans* and *Ricks* precedents stand for the principle that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," this Court held that all the discrete acts of discrimination alleged by Morgan (including wrongful suspensions and denials of training) were "untimely filed and no longer actionable." 122 S. Ct. at 2072-2073. That conclusion did not necessarily apply to Morgan's hostile environment claims because their "very nature involves repeated conduct," so that, "in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* at 2073. This case, by contrast, involves solely allegations of discrete acts of discrimination, not a hostile work environment claim. See Pet. App. 30a. Those acts all occurred prior to the charge-filing period.[1] Thus, applying *Morgan*, respondent's Title VII claim is barred.

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[1] As the district court found, the pay raise received by respondent during the charge-filing period in June 1998, which was equal to or greater on a percentage basis than the raise received by each of her similarly situated co-workers, was not a discrete act of discrimination (even if it resulted in a smaller raise in terms of dollars) but merely "a continuing effect" of salary decisions made prior to the charge-filing period. Pet. App. 46a.

Nothing in *Morgan* indicates that its holding with respect to "discrete acts" applies only to *some* discrete acts, namely, those not involving pay disparities. To the contrary, this Court made clear that, outside the hostile environment context, *all* Title VII claims are barred if based on discrete acts that occurred prior to the filing period, no matter whether their effects or consequences continue to be felt during the filing period. 122 S. Ct. at 2071-2072. Permitting the Tenth Circuit's "paycheck exception" to stand would effectively make *Morgan* a dead letter because plaintiffs could easily circumvent it by depicting all otherwise untimely discrete acts of discrimination as affecting their filing-period pay. See Chamber of Commerce Amicus Br. 9-10.

As explained in the petition (at 19-22), barring claims based on the lingering effects of discrete discriminatory acts is fully consistent with this Court's decision in *Bazemore*. According to respondent, the *Morgan* opinion "acknowledged that *Bazemore* teaches that each discriminatory paycheck is a discrete act of discrimination." Opp. 7. But that is not what this Court said in *Morgan*. Its lone mention of *Bazemore* characterized it as "a pattern-or-practice case [involving] a discriminatory salary structure [in which] the salary discrimination *began* prior to the date that the act was actionable under Title VII." 122 S. Ct. at 2071 (emphasis added). In other words, in *Bazemore* discriminatory patterns or practices occurred before—and *continued to occur during*—the charge-filing period. It was not a case, like this one, involving only the *effects* of discriminatory acts that occurred prior to the filing period. See *Lorance*, 490 U.S.

at 913 n.5 (distinguishing *Bazemore* based on "the timing of the *discriminatory* acts") (emphasis in original). For that reason, the decision below conflicts with *Bazemore*, as well as with *Evans*, *Ricks*, *Lorance*, and *Morgan*.

4. The Length Of The Title VII Damages Period Remains Unresolved.

Respondent also contends that *Morgan* resolved the second issue presented in the petition, namely, whether a Title VII plaintiff may recover damages for a period longer than the charge-filing period. Opp. at 10. However, that issue was not decided in *Morgan*, 122 S. Ct. at 2075, which discussed it in passing only in relation to hostile environment claims, which are not at issue here.

Nor has the second issue been waived, as respondent asserts, on the ground that it was not raised below. Opp. 9. GM *prevailed* on its summary judgment motion in the district court based on plaintiff's untimely EEOC charge and her failure to produce sufficient evidence to create a material issue of fact on GM's liability. In those circumstances, damages were not at issue, and GM had no reason to raise the scope of the period for which damages could be awarded, either in the district court or in the court of appeals. That issue was first raised by the Tenth Circuit in its opinion. See Pet. App. 12a. GM did not waive an issue that it had no need to address prior to its petition and which was actually decided by the court of appeals.

* * *

Both issues presented are of exceptional importance. Substantial doubt over critical aspects of the Title VII claim

process affects not only lower court adjudication but employment relationships throughout the country. This Court should grant the petition to resolve these uncertainties and promote uniform procedures in the resolution of employment discrimination claims. See *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) ("compelling reasons for granting certiorari" include "federal interest in uniformity [and in] firmly defined, easily applied rules" to end "conflict, confusion, and uncertainty" about the timeliness of civil rights claims).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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